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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-250

MORTON H. FRANKLIN, *Petitioner*

VS.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE UNITED STATES OF AMERICA, *Respondent.*
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Morton H. Franklin, respectfully prays that a Writ of Certiorari be issued to review the Opinion entered on July 11, 1979 by the United States Court of Appeals for the Fifth Circuit, affirming the judgment of conviction entered by the United States District Court for the Southern District of Florida for reasons expressed in the petition herein.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, was not officially processed at time of Writ and appears in Appendix (App.) at page 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 11th day of July, 1979. Within thirty (30) days of that date, petition for Writ of Certiorari was filed, pursuant to Rule 22(2) of the Revised Rules of the United States Supreme Court. The jurisdiction of this Honorable Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

I.

WHETHER CHARGES ALLEGED IN A FEDERAL PROSECUTION CAN WITHSTAND A DEFENDANT'S MOTION TO DISMISS UNDER THE POLICY OF LAW MANDATED BY THE DUE PROCESS CLAUSE AND RULE 12 (B)(1) AND (2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WHEN PRIOR TO TRIAL DEFENDANT SHOWS THE CHARGES ALLEGED WERE PRODUCED FROM PRIVILEGED INFORMATION ENTRUSTED BY DEFENDANT IN AN ATTORNEY-CLIENT RELATIONSHIP; DISCLOSED BY DEFENDANT'S ATTORNEY, WITHOUT HIS KNOWLEDGE OR CONSENT, TO FEDERAL LAW ENFORCEMENT AGENTS INVOLVED IN AN INVESTIGATION OF DEFENDANT; AND RELIED UPON BY FEDERAL LAW ENFORCEMENT AGENTS IN THE INVESTIGATION AND PROSECUTION OF DEFENDANT AS "RELI-

ABLE" INFORMATION SUPPLIED BY A CONFIDENTIAL GOVERNMENT INFORMANT?

II.

WHETHER THE FAILURE TO PERMIT A DEFENDANT TO PRESENT EXCULPATORY EVIDENCE POSSESSED BY AVAILABLE WITNESSES WAS ERROR PREJUDICIAL TO DEFENDANT'S FUNDAMENTAL RIGHT TO THE COMPULSORY PRODUCTION OF FAVORABLE EVIDENCE, WHEN PRIOR TO TRIAL DEFENDANT SHOWED, UNDER THE PARTICULAR FACTS AT BAR, THE PRODUCTION OF EVIDENCE VITIATING INTENT, KNOWLEDGE OR AGREEMENT WAS MATERIAL TO HIS DEFENSE AND ESSENTIAL FOR A FAIR ADJUDICATION OF THE GOVERNMENT'S CAUSE?

CONSTITUTIONAL PROVISIONS

Question/Argument I:

FOURTH AMENDMENT, UNITED STATES CONSTITUTION — RIGHT TO PRIVACY (App. 6);

FIFTH AMENDMENT, UNITED STATES CONSTITUTION — RIGHT TO FAIR TRIAL WITH DUE PROCESS OF LAW IN FEDERAL CRIMINAL PROSECUTION (App. 6);

SIXTH AMENDMENT, UNITED STATES CONSTITUTION — RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL (App. 6).

Question/Argument II:

FIFTH AMENDMENT, UNITED STATES CONSTITUTION — RIGHT TO A FAIR TRIAL WITH

DUE PROCESS OF LAW IN FEDERAL CRIMINAL PROSECUTION (App. 6);

SIXTH AMENDMENT, UNITED STATES CONSTITUTION — RIGHT TO COMPULSORY PRODUCTION OF EVIDENCE FAVORABLE TO AN ACCUSED (App. 6).

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FEDERAL RULES OF EVIDENCE

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STATEMENT OF THE CASE

On August 26, 1976, petitioner was named as a defendant in the first three counts of an eleven-count indictment filed in the United States District Court for the Southern District of Florida. Gerald "Jerry" Cunningham, Earl Dameworth and Defense Weapons International Engineering and Research, Incorporated (DWIER) were named as co-defendants and alleged coconspirators in all eleven counts of the indictment. The indictment alleged that the named defendants were involved in a conspiracy to defraud a federally insured bank for the purpose of obtaining and unlawfully transferring implements of war. The charges consisted of the following: 18 U.S.C. §371, Conspiracy (Counts I and III); 22 U.S.C. §1934, Unlawful Export of Arms (Count I); 18 U.S.C. §§1014 and 2, aiding and abetting the making of a false statement to influence loan by F.D.I.C. bank (Count II); and 26 U.S.C. §§5861 (e) and 5871, Conspiracy to Unlawfully Transfer Guns and Conceal Their Export (Counts III through XI).

Petitioner had been targeted for investigation in the alleged weapons conspiracy prior to August of 1975, on the basis of

information reportedly received from a reputed narcotics dealer, Kenneth Bernstein. Special Agent Zisk of United States Customs was the case agent in charge of the government's investigation. Zisk obtained additional information regarding the petitioner and an alleged conspiracy to illegally export arms in November of 1975 from Special Agent Warner of the Federal Drug Enforcement Agency (D.E.A.). Warner was the case agent in a previous criminal prosecution of petitioner.* Warner was contacted by Officer Ragen, supervisory air officer for the United States Customs Service, in late November of 1975. Ragen informed S/A Warner he had learned from petitioner's attorney, Robert Senor, that petitioner had information which might be useful to the government concerning an alleged conspiracy to illegally export arms; and, that petitioner's attorney inquired if petitioner could obtain leniency in his pending prosecution in exchange for his cooperation in this matter. The information was subsequently passed on to S/A Zisk — case agent on the alleged conspiracy to illegally export arms.

Officer Ragen had learned of petitioner's information concerning the purported gun conspiracy as a result of his professional relationship with petitioner's attorney, Robert Senor. During the same time period that attorney Senor was providing legal consultation for petitioner regarding his prior criminal prosecution, Attorney Senor was also representing Officer Ragen in his official capacity before the Federal Grand Jury (T.M. 52:118).* In late November of 1975, attorney Senor informed Officer Ragen that his client, petitioner, had information concerning a gun smuggling scheme which supposedly

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*The case referred to was under caption *United States v. Bell, et al.*, Case Number 75-640-CR-P.F., and was returned by the Federal Grand Jury for the Southern District of Florida in November of 1975. The indictment alleged conspiracy to illegally import marijuana.

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*The "T.M." refers to the official transcript of proceedings before Magistrate Palermo on September 12, 1977.

involved one Gerald Cunningham and Earl Dameworth; and, that he (attorney Senor) wondered if he could receive leniency in his client's recent criminal indictment by obtaining his client's cooperation in providing this information (T.M. 52-53; 59; 119-22). Attorney Senor made these disclosures without the knowledge or consent of his client — the petitioner (T.M. 62).

Officer Ragen informed Attorney Senor that his proposed exchange of information in return for leniency in petitioner's pending criminal suit was beyond the purview of his authority. Nonetheless, Officer Ragen agreed to put Senor in contact with someone in a position to "barter" with him (T.M. 122).

On December 5, 1975, S/A Zisk telephoned attorney Senor for information on petitioner — a target defendant — regarding the alleged weapons conspiracy (T.M. 20). The call was the result of Senor's earlier discussion with Officer Ragen (T.M. 22; 41). Attorney Senor and S/A Zisk discussed the possibility of providing information regarding the purported gun smuggling scheme in exchange for some form of leniency or plea bargaining with respect to petitioner's pending criminal prosecution (T.M. 24). The negotiations occurred without the knowledge or consent of petitioner or petitioner's trial attorney, Leonard Yelsky (T.M. 27; 66; 102-103).

Subsequent to December of 1975, attorney Senor had other conversations with S/A Zisk. Senor informed Zisk that petitioner had told him Cunningham was going to receive 1,000 submachine guns; that the guns had already been contracted for; that once the guns were received, a burglary was going to be staged which would cover up the illegal export of weapons (T.M. 142); that Cunningham had traveled to Cleveland at least three times regarding a loan to finance guns; that during these trips, Cunningham was met by Sonny Pace; and, that he, petitioner, introduced Cunningham to Bartone regarding a loan from New Jersey banker James Neveras (T.M. 156-59).

Attorney Senor also informed Zisk that petitioner told him he was not involved in the purported scheme to export guns (T.M. 146; 148); and that he, petitioner, was Jewish and was concerned that the guns might be destined for Arab terrorists (T.M. 70; 148; 161). Attorney Senor provided this information as a government confidential informant and without the knowledge or consent of his client, petitioner, until late April of 1976 (T.M. 77-78; 98; 142).

On February 19, 1976, Gerald Cunningham and Earl Dameworth were arrested in an alleged scheme to illegally export guns. A cache of weapons was seized pursuant to the search warrant affidavit of S/A Zisk. The Zisk affidavit relied on four confidential informants in purporting to establish probable cause (T.M. 20-21).

S/A Zisk telephoned attorney Senor in April of 1976 and informed him that Cunningham and Dameworth had been arrested (T.M. 24). Zisk inquired if Senor would be willing to intercede on the government's behalf in an attempt to work out a solution satisfactory to both Cunningham's attorney and the government. Zisk informed Senor that Cunningham had also been arrested by the State of Florida on a related weapons charge; that the state had enough on Cunningham to put him away; that all the government was really interested in was to work out an arrangement whereby the confiscated weapons would remain with the government and no further action would be taken against Cunningham (T.M. 34-35). Senor contacted Cunningham's attorney, Barry Halpern, and set up a meeting for April 26, 1976 (T.M. 35).

During the April 26 meeting, Senor informed Mr. Halpern that he was acting on behalf of S/A Zisk; and, that the government was interested in working out an "arrangement" with his client, Gerald Cunningham (T. 33-35).* Mr. Halpern informed

*The "T" symbol refers to the official trial transcript in the matter herein.

Senor that his client had a defense to the pending charges. More specifically, that Cunningham had a valid government license to sell the confiscated weapons. Senor reported this information back to agent Zisk (T.M. 36). A discussion occurred regarding the possibility of an interview with petitioner. It was at this time that attorney Senor informed petitioner of his contacts with Officer Ragen and Special Agent Zisk and suggested that petitioner meet with them (T.M. 79-80; 97-98). A meeting was scheduled for May 3, 1976 at Key Biscayne, Florida (T.M. 76-77).

The May 3 meeting was attended by petitioner, attorney Senor, Officer Ragen, S/A Zisk and John Evans, Special Attorney for the United States Strike Force (T.M. 79). Petitioner's attorney of record in the pending marijuana prosecution was not notified of the meeting (T.M. 102-104). An impasse occurred when Mr. Evans informed petitioner that he had to read him his constitutional rights (T.M. 80). Attorney Senor believed that this was contrary to his prior understanding with S/A Zisk and requested immunity (T.M. 80; 125). An arrangement was reached, pursuant to a suggestion made by Officer Ragen, whereby petitioner remained alone in one room and questions were posed from another room through attorney Senor. At no time was petitioner advised of his constitutional rights by Mr. Evans (T.M. 80-81; 125). Information which had been passed on by Cunningham to petitioner was disclosed. Specifically, that Cunningham was dealing with a Lebanese gunmaker named Busante; that a gun theft was planned involving a Latin American who owned a gas station; that Cunningham wanted petitioner to take out an insurance policy on the warehouse in which the guns were to be stored (T.M. 87-88). Information was also disclosed regarding a New Jersey bank loan application (T.M. 83-84).

Immediately following the May 3 meeting, petitioner went to lunch with Senor and Officer Ragen (T.M. 125). It was

decided at this time that petitioner would work for Officer Ragen as a government confidential informant (T.M. 126). In June of 1976, S/A Zisk also contacted attorney Senor about making petitioner his confidential informant (T.M. 87).

In August of 1976, petitioner stood trial on the charges alleged in the November, 1975 indictment (75-640-Cr-PF). At the request of petitioner attorney Senor attended the first week of trial, but was not an attorney of record (T.M. 16; 56). During the course of the trial, co-defendant Cunningham testified that his involvement in the alleged marijuana conspiracy was in the role of a government agent provocateur; that he acted under the direction of purported C.I.A. operative and co-defendant Mitchell Werbell III; that Mr. Werbell's contact agent was Colonel Lucien Conein, special agent in charge of field operations for the D.E.A.; that the nature of his action concerned a covert investigation of reputed drug dealer Kenneth Bernstein; and, that he enlisted the aid of petitioner to assist in this investigation by providing a financial front (T. 1444-52; 1674-76). On September 3, 1976, petitioner and each co-defendant were acquitted of all charges in the alleged conspiracy to import marijuana.

On August 26, 1976, and immediately prior to petitioner's acquittal in the alleged marijuana conspiracy, petitioner was named as a defendant in the present cause. Gerald Cunningham, Earl Dameworth and Defense Weapons International Engineering and Research, Incorporated (DWIER) were also named as defendants and alleged coconspirators. The indictment alleged in pertinent part that from July of 1975 until August 26, 1976, petitioner conspired with Cunningham, Dameworth and DWIER in a scheme to illegally export arms, ammunitions and implements of war; that part of the conspiracy involved submitting a materially false statement on a loan application to the Trust Company of New Jersey; that the money obtained from the Trust Company was to apply to the purchase of 1,000

Ingram submachine guns; and, that part of the conspiracy involved a plan to conceal the unlawful exportation of machine guns by reporting them stolen in a burglary. The indictment was signed by Strike Force Attorney John Evans.

Following his indictment in the purported conspiracy to export weapons, petitioner continued to work as a government informant for Officer Ragen of United States Customs (T.M. 128; 134). Petitioner communicated information to Officer Ragen relative to the smuggling of narcotics and the exportation of guns (T.M. 129-30). Information relative to Gerald Cunningham, Earl Dameworth, "Hank" Greco and Dominick Bartone was also supplied by petitioner to Officer Ragen (T.M. 134-38). Officer Ragen took notes of his communications with petitioner. Unbeknownst to petitioner, these notes were subsequently supplied to the Strike Force attorney prosecuting petitioner's weapons related indictment, John Evans (T.M. 130; 133).

In the early part of January, 1977, petitioner and Cunningham went to the office of Florida attorney Ben Cohen to discuss their pending weapons prosecution. Cunningham's trial attorney, Barry Halpern, had withdrawn from the case, and Cunningham was purportedly interested in retaining Mr. Cohen. Cohen informed Cunningham that this was not possible because he represented a potential government witness in the case, Dominick Bartone. Cunningham purportedly told Mr. Cohen that neither Bartone nor petitioner had anything to do with the alleged conspiracy to export weapons. Cohen informed Cunningham that the government appeared to have a strong case against him and recommended that Cunningham try to arrange a deal and at least exonerate those who were innocent. Cunningham purportedly told Mr. Cohen that he planned to flee to Cuba. This disclosure upset Mr. Cohen, and he told Cunningham to leave his office and never call again (T. 2744-45).

On February 11, 1977, co-defendants Cunningham, Dameworth and DWIER entered a change of plea, pleading guilty to Counts I and II of the indictment. The government dismissed Counts III through XI against the co-defendants. A superseding indictment was returned against petitioner on March 10, 1977 to reflect the addition of Dominick Bartone and Henry Greco as co-defendants. Greco died prior to trial.

In April of 1977, S/A Zisk and Strike Force attorney John Evans traveled to Newark, New Jersey to speak with James Neveras (T. 2432). Mr. Neveras was a vice president in commercial lending at the Trust Company of New Jersey (T. 2076). He had approved a $50,000.00 loan to Cunningham's company, DWIER, on November 5, 1975 (T. 2093). On April 6, 1976, Neveras was subpoenaed by the Federal Grand Jury to produce the November 5 loan note and credit file (T. 2106). The note presented by Mr. Neveras bore only the endorsement of Cunningham (T. 2134). The original note bearing Dominick Bartone's co-endorsement had been omitted from the credit file (T. 2091; 2134). On July 1, 1976, the $50,000.00 loan to DWIER was paid in full by Cunningham (T. 2180).

In April of 1977, Mr. Neveras was named as a defendant in an information which alleged that Neveras obstructed justice in connection with his grand jury testimony on April 6, 1976 (T. 2186-87). On April 28, 1977, Neveras pled guilty to the information. Sentencing was held in abeyance until after Neveras' testimony against petitioner (T. 2188).

On May 18, 1977, petitioner and Dominick Bartone were named as co-defendants in a two-count indictment returned by the Federal Grand Jury for the Southern District of Florida (Case No. 77-243-Cr-NCR). The indictment alleged that the co-defendants conspired to obstruct justice and obstructed justice by persuading and influencing a witness, James Neveras, to give false testimony before a Federal Grand Jury.

In early May of 1977, petitioner filed a pretrial motion to disclose the identity of informants whose information the government relied upon in the prosecution of its case. Specific reference was made to the February 19, 1976 search warrant affidavit of S/A Zisk. Petitioner contended that the government's case was laid upon a foundation of information obtained from confidential informants; that said informants' identity was material to his defense; and, that the content of the communications was essential to a fair determination of the government's cause (See App. 9-13).

The government resisted disclosure. In response to petitioner's motion, the government argued that it could not provide the court with the full facts concerning the informants without "possibly" jeopardizing the physical well-being of one or more of the informants. On June 8, 1977, Magistrate Eskenazi ordered the government to reveal the identity and content of communications from three confidential informants relied upon in the Zisk affidavit, and ordered the government to make the fourth informant available to petitioner at time of trial (See App. 14-15).

On June 13, 1977, the government revealed three "confidential informants" relied upon in the prosecution of its cause (See App. 16-17). One of the informants was Detective Wayne Tobey of the Pompano Beach Police Department. Mr. Tobey had since been removed from the force because of his conviction for falsifying police reports (T. 15). The second "confidential informant" was reputed drug smuggler and convicted felon Kenneth Bernstein. Mr. Bernstein had been dead since June of 1976 (T. 15). The third "confidential informant" identified was petitioner's attorney, Robert Senor (T. 16). Mr. Senor had represented petitioner for approximately twenty years and had been consulted by petitioner in a professional attorney-client relationship regarding the purported conspiracy to export arms (T.M. 13-19). Following this disclosure, petitioner motioned

the court to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure (See App. 18-23).

A hearing was provided on September 12, 1977 before Magistrate Palermo on petitioner's Motion to Dismiss. S/A Zisk testified that *he* telephoned petitioner's attorney, Robert Senor, in December of 1975 (T.M. 141). This fact had been misrepresented in the government's disclosure of June 13, 1977, to indicate that attorney Senor telephoned agent Zisk (See App. 16). Zisk further testified that petitioner's attorney, Robert Senor, had been utilized as one of four confidential informants in the government's investigation (T.M. 144); that he was informed by attorney-informant Senor his client, petitioner, told him Cunningham traveled three times to Cleveland to obtain a loan to finance guns (T.M. 156); that attorney-informant Senor told him petitioner introduced Cunningham to Bartone regarding a loan from New Jersey banker James Neveras (T. 156-59); that attorney-informant Senor told him that he had learned from petitioner Cunningham's intention to receive 1,000 machine guns and stage a burglary to cover up the illegal export of the weapons (T.M. 142). S/A Zisk also testified that he told the Federal Grand Jury information disclosed to him by attorney-informant Senor which ultimately resulted in petitioner's indictment (T.M. 155; 159-162).

At the close of the September 12 hearing, Magistrate Palermo recommended denial of petitioner's Motion to Dismiss (T.M. 183). The Magistrate reasoned that there was no proof attorney Senor was used by the government as an informant; that the information supplied by attorney Senor was voluntary; and, that the credibility and demeanor of attorney Senor were evasive and suggested the possibility of perpetrating a fraud upon the court, without the knowledge of petitioner's trial attorney, Leonard Yelsky (T.M. 183-84). Absent from the Magistrate's determination was any finding that the information con-

veyed by attorney Senor to the government was made with his client's knowledge or consent.

On October 20, 1977, the transcript of the Magistrate's hearing was filed with the trial court. Pursuant to 28 U.S.C. §636, petitioner motioned the trial court to overrule the findings of the Magistrate in a *de novo* determination of the matter. The trial judge affirmed the ruling of the Magistrate and ordered the case to proceed to trial.

On June 10, 1977, the government moved to join petitioner's indictment for the alleged obstruction of justice, 77-243-Cr-NCR, with his prior indictment for the alleged conspiracy to export arms, 76-6066-Cr-CA. Over objection by petitioner, the trial court granted the government's request to join the two indictments for trial.

During the course of the trial, petitioner requested that the fourth informant relied upon in the Zisk affidavit be made available to defense counsel, pursuant to the pretrial order (T. 1013-14; 2456-63). Petitioner's motion was denied (T. 2525-26).

During cross-examination of S/A Zisk, petitioner attempted to impeach the credibility of Zisk and the government's entire investigation by exposing the caliber of informants relied upon in its investigation (T. 2466-67). Petitioner was precluded from cross-examining Zisk on the "confidential sources" relied upon by the government as being beyond the scope of cross-examination (T. 2463-65; 2470-71).

Petitioner intended to call attorneys Barry Halpern and Ben Cohen as witnesses for the defense (T. 2506). Mr. Cohen's client, co-defendant Bartone, did not object to his attorney testifying (T. 2718). Mr. Halpern had purportedly been told by Cunningham that he asked petitioner to help him get financing for the purchase of guns; that it was an entirely legitimate deal; that petitioner then introduced him to Bartone; and, that neither petitioner nor Bartone were to participate in any of the profits gleaned from the sale of guns (T. 2506-07). The trial court would not permit Mr. Halpern to testify for the defense (T. 2506).

Cunningham had purportedly told Mr. Cohen that petitioner and Bartone had "absolutely nothing" to do with the alleged conspiracy to export guns (T. 2745); and, that he planned to flee to "Castro country" (T. 2745). The trial court would not permit Mr. Cohen to testify for the defense (T. 2738).

On December 30, 1977, the jury returned with its verdict. Petitioner and co-defendant Bartone were found not guilty of the conspiracy to illegally export implements of war (Count I of #76-6066). The jury was unable to reach a verdict on the alleged violations of the Neutrality Act (Count III of #76-6066).

Petitioner and co-defendant Bartone were found guilty of aiding and abetting false statements on a loan application (Count II of #76-6066); and of conspiring to obstruct justice by influencing the testimony of a Grand Jury witness (Counts I and II of #77-243).

Petitioner filed a timely Notice of Appeal to the Fifth Circuit Court of Appeals and presented the following issues for review:

ARGUMENT I.

THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLANT'S RULE 12(B) MOTION TO DISMISS PERMITTED THE GOVERNMENT TO PROSECUTE DEFENDANT-APPELLANT ON THE BASIS OF INFORMATION IMPARTED TO HIS ATTORNEY IN A CONFIDENTIAL RELATIONSHIP AND CANNOT RESULT IN A CONSTITUTIONALLY VALID CONVICTION, WHERE THE GOVERNMENT UTILIZED DEFENDANT-APPELLANT'S ATTORNEY AS A CONFIDENTIAL GOVERNMENT INFORMANT IN CONTRAVENTION OF DEFENDANT-APPELLANT'S FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW.

ARGUMENT II.

DEFENDANT-APPELLANT WAS PREJUDICIALLY DENIED A FAIR AND IMPARTIAL TRIAL WITH DUE PROCESS AND COMPULSORY PROCESS OF LAW, WHERE THE TRIAL COURT REFUSED TO ORDER THE GOVERNMENT TO PRODUCE A POTENTIAL DEFENSE WITNESS, UNREASONABLY RESTRICTED CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS AND PREVENTED EXCULPATORY EVIDENCE FROM BEING PRESENTED BY TWO WITNESSES FOR THE DEFENSE.

On July 11, 1979, the Fifth Circuit Court of Appeals affirmed the findings of the trial court. Petitioner now seeks the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING WRIT

i). The Fifth Circuit has adopted a lower court's construction of an important question of Federal law — the extent to which Federal law enforcement agents may justifiably penetrate a target defendant's attorney-client relationship — in a manner inconsistent with the policy of law mandated by leading Supreme Court and Federal Circuit decisions;

ii). The Fifth Circuit has decided an important question of Federal law — whether Federal law enforcement agents can utilize a target defendant's attorney as a Government confidential informant — which has not been, but should be, settled by this court;*

iii). The Fifth Circuit has adopted a lower court's construction of an important question of Federal law — whether a defendant's cross-examination of a material witness for the prosecution necessarily limits and restricts a defend-

*The question of how far a Federal investigation may constitutionally use a defendant's attorney as a source of information is of particular national concern and requires clarification in view of past abuses in the use of informants and the proposed F.B.I. charter restricting the use of informants now pending Congressional review (App. 24).

ant's fundamental right to produce exculpatory evidence under the due process clause — in a manner inconsistent with the policy of law mandated by leading Supreme Court and Federal decisions;

iv). The Fifth Circuit has adopted a lower court's construction of an important question of Federal law — whether the interpretation and application of Rule 613(b) of the Federal Rules of Evidence can justifiably preclude a defendant from presenting exculpatory evidence requested as a matter of fundamental right under the due process clause — which has not been, but should be, settled by this court.

ARGUMENT

I.

A RULE 12(B)(1) MOTION TO DISMISS WILL ENTITLE A DEFENDANT TO DISMISSAL OF CHARGES ALLEGED IN A FEDERAL PROSECUTION AS A MATTER OF FUNDAMENTAL DUE PROCESS OF LAW, WHEN DEFENDANT SHOWS AT A PRETRIAL HEARING THE CHARGES ALLEGED WERE PRODUCED FROM PRIVILEGED INFORMATION ENTRUSTED BY DEFENDANT IN AN ATTORNEY-CLIENT RELATIONSHIP; DISCLOSED BY HIS ATTORNEY TO AGENTS OF THE PROSECUTION WITHOUT DEFENDANT'S KNOWLEDGE OR CONSENT; AND, RELIED UPON IN THE INVESTIGATION AND PROSECUTION AS RELIABLE INFORMATION SUPPLIED BY A CONFIDENTIAL GOVERNMENT INFORMANT.

A. The Fifth Circuit has adopted a lower court's construction of an important question of Federal law in a manner inconsistent with the policy of law mandated by leading Supreme Court and Federal Circuit decisions.

In *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the Supreme Court held that an undercover agent's mere intrusion into a defendant's attorney-client relationship would not "per se" render a conviction fatal under the due process clause. The *Bursey* court found that in order for an attorney-client intrusion to sufficiently taint a conviction the information obtained must be "communicated . . . to superiors or to the prosecution," *Id.* 429 U.S., at 556; and create "a realistic possibility of injury to [defendant] or benefit to the state," *Id.,* 429 U.S., at 558.

In the case at bar, the Fifth Circuit held that the prosecution's admitted use of petitioner's long-time friend and attorney as a government confidential informant did not create a realistic possibility of injury to petitioner or benefit to the prosecution. This is true even though the case agent in an investigation involving petitioner as a target defendant admitted that he called petitioner's attorney for information relative to his investigation; that he used petitioner's attorney as a confidential informant in obtaining information imparted by petitioner in an attorney-client relationship; that he communicated the attorney-client information, obtained without petitioner's knowledge or consent, to the grand jury in perfecting the government's charges in the investigation and pending prosecution of petitioner.

The Fifth Circuit's reasoning found that the government's intrusion into petitioner's attorney-client relationship did not taint his conviction because the information so obtained was available from "other sources" independent of the attorney's communications; the information so obtained was not incriminating to defendant; the information was communicated by petitioner's attorney "voluntarily"; the petitioner waived his attorney-client privilege and ratified his attorney's communication in a subsequent meeting with the prosecutor (at the case

agent's instigation) seven months after the initial intrusion (see App. 4).

The Fifth Circuit's reasoning is inconsistent with the underlying rationale in *Bursey* and the policy of law mandated by leading case law authorities.

The law in the area of confidential communications is clear. The general rule has historically been that confidential communications by a client to his attorney in the course of their relationship is privileged and may not be revealed. *Chirac v. Reinicker,* 24 U.S. (11 Wheat) 280, 6 L.Ed. 474 (1826). The holder of the privilege is the client and the privilege can only be waived by the holder. *Alexander v. United States,* 138 U.S. 353, 11 S.Ct. 350, 34 L.Ed. 954 (1891). As a consequence, the "voluntariness" of attorney Senor's disclosures is immaterial when considering the constitutionality of the government's attorney-client intrusion.

Similarly, the Fifth Circuit's finding of an "implied ratification" by petitioner's consent to meet with agents of the prosecution, seven months after his attorney's unwarranted disclosures of his confidential communications, lacks foundation in law or fact. Waiver of a fundamental privilege must be with knowledge, intent and requires affirmative, unequivocal action on the part of the holder. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Under the facts at bar, petitioner's meeting with agents of the prosecution in May of 1976 was set up by the prosecution; and, petitioner's communications at the meeting were made through his attorney with the utmost reluctance and suspicion.

The Fifth Circuit's opinion held that even if the government acted in an illegal manner, a motion to dismiss was not the proper remedy. The court's decision would never permit dismissal of a prosecution no matter how repugnant the attorney-client intrusion (App. 4). The court found that petitioner's

remedy was limited to the suppression of evidence illegally obtained; and, that petitioner waived this objection by not raising it at trial.

Again the Fifth Circuit's opinion failed to appreciate the remedial powers possessed by the Federal judiciary when confronted with a prosecution in which the charges alleged were produced from an unwarranted attorney-client intrusion (App. 18-23). The policy of law requiring a dismissal under Rule 12(b) was best stated in *Caldwell v. United States,* 92 U.S. App. D.C. 355, 205 F.2d 879 (D.C. Cir. 1953):

> "High motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel. *The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the government can with impunity place a secret agent in a lawyer's office, to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense . . . if it does occur a conviction tainted by it cannot stand.*" [Emphasis added.] *Id.,* 205 F.2d, at 881, cited with approval in *Weatherford v. Bursey, supra,* at 553; and *Hoffa v. United States,* 385 U.S. 293, 306; 87 S.Ct. 408; 17 L.Ed.2d 374 (1966).

Dismissal of a Federal prosecution as a matter of fundamental due process of law was noted in another benchmark decision addressing the issue of the prosecution's unwarranted intrusion into a defendant's attorney-client relationship. In *Coplon v. United States,* 89 U.S. App. D.C. 103, 191 F.2d 749 (1951), the court held that interceptions by government agents of telephone messages between a defendant and her attorney could not result in a constitutionally valid conviction.

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty." *Id.,* 191 F.2d, at 751, cited with approval in *Hoffa v. United States, supra,* at 306; *Weatherford v. Bursey, supra,* at 553.

B. The Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

This Court has never considered whether Federal or state law enforcement agents can constitutionally utilize a target defendant's attorney as a government confidential informant in perfecting its indictment against the defendant.

The Fifth Circuit's opinion allows Federal law enforcement agents to justifiably penetrate a target defendant's attorney-client relationship with impunity, by utilizing the target defendant's attorney as a confidential source of information in perfecting the prosecution's charges against the defendant. The decision comes at a time when past abuses in the use and control of confidential informants has become an issue of national concern for the legislature (App. 24). As a result, the extent to which Federal law enforcement agents may justifiably utilize a target defendant's attorney as a government confidential informant is an issue ripe for review.

ARGUMENT

II.

A TRIAL COURT'S REFUSAL TO ALLOW THE PRODUCTION OF EXCULPATORY EVIDENCE IN A

CRIMINAL PROSECUTION, ON THE GROUNDS THAT THE DEFENDANT FAILED TO LAY A PROPER FOUNDATION FOR IMPEACHMENT, IS ERROR PREJUDICIAL TO A DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS OF LAW, WHERE PRIOR TO TRIAL, DEFENDANT SHOWS A SPECIFIC NEED FOR EVIDENCE POSSESSED BY PARTICULAR WITNESSES WHICH, IF BELIEVED BY THE JURY, WOULD VITIATE MATERIAL ELEMENTS TO THE CHARGES ALLEGED.

A. The Fifth Circuit has adopted a lower court's construction of an important question of Federal law in a manner inconsistent with the policy of law mandated by leading Supreme Court and Federal decisions.

In petitioner's Motion to Disclose Informants, petitioner argued that he was charged with offenses responsive to information provided by four confidential informants; that access to potential witnesses capable of establishing his lack of knowledge, purpose or intent to engage in the alleged offenses was material to his defense; that the identity of the informants and the content of their communication was material to the issue of petitioner's guilt or innocence; and, that under the particular facts at bar, the compulsory process clause of the Sixth Amendment required disclosure (see App. 9-13).

On June 8, 1977, Magistrate Eskenazi entered an Order directing the government "to reveal the contents of any communications" from informants numbered 1 through 3, and "to take such steps as may be necessary to assure the presence of confidential informant #4 at trial so that he may be available as a defense witness should the defendant or defendants desire to call him" (App. 14-15).

Petitioner requested the trial court to order the government to comply with the June 8, 1977 ruling of Magistrate Eskenazi (T. 2457-60). The government had not revealed the "contents of communications" from informants #1 through #3 and had not made informant #4 available at trial. The trial judge admitted a lack of awareness of the Magistrate's Order (T. 1013-14). Strike Force attorney John Evans assured the court that the government had complied with the Order and was not required to produce the fourth informant at trial (T. 2458; 2460). The trial court did not require his production as a potential defense witness (T. 2457-62).

Special agent Zisk testified regarding information purportedly received from confidential informants (T. 2454). Zisk testified that confidential informant #4 implicated petitioner in the charges alleged, even though the affidavit purporting to contain the information supplied by the informants *never* mentioned petitioner (T. 2533-41). Petitioner was limited in attacking the credibility of special agent Zisk, as well as the government's investigation, when the trial judge precluded cross-examination into Zisk's personal knowledge of the informants relied upon by the government (T. 2463-65; 2469-72; 2493-94; 2448).

At the close of the government's case, petitioner sought to produce exculpatory evidence in his defense through the testimony of attorneys Barry Halpern and Ben Cohen. Their testimony was relative to extrajudicial statements made by alleged coconspirator and key prosecution witness Gerald Cunningham. The statements exonerated petitioner of any culpability in the offenses alleged (T. 2506-12; 2744-45). The trial court would not allow either witness to testify for the defense (T. 2512-13; 2738-42).

The trial court's refusal to order the production of a potential defense witness, confidential informant #4, limited scope of cross-examination of the government's primary investigative

cross-examination of the government's primary investigative witness, special agent Zisk; and failure to allow petitioner to present the testimony of two material defense witnesses, Barry Halpern and Ben Cohen, was affirmed by the Fifth Circuit Court, on the grounds that petitioner failed to lay a proper foundation, under Rule 613(b) of the Federal Rules of Evidence, for the proper admission of impeachment evidence.

It is petitioner's position that the Fifth Circuit's opinion is inconsistent with the policy of law mandated by leading Supreme Court and Federal Circuit decisions regarding the construction of a criminal defendant's fundamental due process right to the compulsory production of evidence favorable to an accused.

The Sixth Amendment guarantees every defendant the right to produce evidence in his favor and discredit evidence presented against him.

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . " U.S. Constitution, Sixth Amendment.

This fundamental right has been construed to entitle a defendant to present his version of the facts through direct testimony of defense witnesses. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi,* 410 U.S. 283, 297-98, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). It has also been found to entitle a defendant to elicit evidence in his favor from prosecution witnesses on cross-examination. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

In the case at bar, the Magistrate found that petitioner had a constitutional right to the production of confidential informant #4, when the court granted petitioner's *Roviaro* Motion (see App. 9-15).

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the government withholds the information, dismiss the action . . . " *Roviaro v. United States,* 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

While it is true that the prosecution has no obligation under the compulsory process clause to produce witnesses on a defendant's behalf, the witness must be produced once requested by a defendant. *United States v. Wolfson,* 322 F.Supp. 798, 819-22 (D.C. Del. 1971), *aff'd* 454 F.2d 60 (3rd Cir.), *cert. den.,* 406 U.S. 924 (1972). See also, Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 7, at 159-77 (1974). The rationale underlying this fundamental right was noted in the case of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty, helps shape a trial that bears heavily on the defendant. This casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice even though . . . his action is not the result of guile." 373 U.S., at 88.

Similarly, the trial court's refusal to permit petitioner to present the testimony of defense witnesses Barry Halpern and Ben Cohen constituted a prejudicial denial of compulsory process. Their proffered testimony directly impeached and discredited evidence produced against petitioner (T. 2506-12; 2744-45), but more importantly, vitiated material elements to the charges alleged. The trial court's denial operated to exclude evidence

which, if accepted by the jury, would have exonerated petitioner of any culpability in the charges alleged. As a direct result, petitioner was unreasonably restricted in presenting a proper defense as construed by leading case law authorities.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. *Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.*" [Emphasis added.] *Washington v. Texas, supra,* at 19; see also *Glingan v. United States,* 400 F.2d 848, 851 (5th Cir. 1968); *Welcome v. Vincent,* 549 F.2d 853, 857 (2d Cir. 1977); *United States v. Goodlow,* 500 F.2d 954, 958 (8th Cir. 1974).

Accordingly, before a trial court may deny a defendant's fundamental right to compulsory process, it has a duty to show that neither the witnesses nor their testimony are admissible under independent standards of the Sixth Amendment. See Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567, 592 (1978).

The trend of the law reflects the principle that a defendant should be permitted to defend himself at trial by eliciting evidence in his favor from prosecution witnesses, including the right to probe into the influence of possible bias or mistake of a crucial prosecution witness. See *Davis v. Alaska, supra,* and *Smith v. Illinois, supra.* This is especially true where the government's chief investigative witness, special agent Zisk, relied on informants who did not implicate petitioner in the original affidavit of February 19, 1976, and then subsequently altered his

testimony regarding informants to include petitioner as an original alleged coconspirator. The trial court's limited cross-examination precluded petitioner from exposing to the jury Zisk's reliance on dubious sources of information so that the jury could draw inferences relating to his credibility and the character of the government's investigation.

> "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it.' " *Davis v. Alaska, supra,* at 318, citing *Smith v. Illinois, supra,* at 131.

B. The Fifth Circuit has adopted a lower court's construction of an important question of Federal law which has not been, but should be, settled by this Court.

The Supreme Court has never decided the issue of whether a proper interpretation and application of Rule 613(b) of the Federal Rules of Evidence can ever justifiably act as a means to preclude a criminal defendant from presenting exculpatory evidence under the compulsory process clause of the Sixth Amendment.

The controlling rationale expressed in the broad holdings

of law stated in *Washington v. Texas, supra; Chambers v. Mississippi, supra; Brady v. Maryland, supra; Davis v. Alaska, supra; Smith v. Illinois, supra;* and the policy of law reflected in Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567 (1978) is at odds with the Fifth Circuit's restrictive construction of a defendant's fundamental right to the compulsory production of exculpatory evidence and requires clarification.

In the case at bar, petitioner sought to impeach the credibility of the government's primary investigative witness officer, agent Zisk, by exposing the caliber of informants relied upon in the government's investigation (T. 2466-67). In particular, agent Zisk's use of a notorious convicted felon, Kenneth Bernstein, and a patrolman expelled from the force for falsifying police reports, Wayne Toby, as "reliable" sources of information. In addition, petitioner sought to elicit testimony regarding special agent Zisk's unconscionable utilization of petitioner's attorney as a government informant; and, information received by Zisk from attorney-informant Senor regarding petitioner's lack of culpability in the charges alleged (T. 2463; 2470-71). The trial court precluded cross-examination into the area of informants on the grounds that it went beyond the scope of direct examination (T. 2493-94; 2498). The court's reasoning appears to be at odds with the policy of law set down by the High Court in *Chambers v. Mississippi, supra.*

> "The availability of the right to confront and cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by a technicality or by any narrow and unrealistic definition of the word 'against.' " 410 U.S., at 297-98.

CONCLUSION

Based on all of the foregoing arguments and authorities of law, Petitioner, Morton H. Franklin, respectfully requests that his Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals be granted.

Respectfully submitted,

Leonard W. Yelsky
Angelo F. Lonardo
Attorneys for Petitioner

PROOF OF SERVICE

The undersigned certifies that four true and correct copies of the within Petition for Writ of Certiorari have been served upon the office of the United States Solicitor General, Wade H. McCree, Department of Justice, Pennsylvania Avenue, North West, Room 5614, Washington, D.C. 20530, postage prepaid, on this _____ day of August, 1979.

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UNITED STATES v. FRANKLIN

UNITED STATES of America,
Plaintiff-Appellee,

v.

Morton "Mort" H. FRANKLIN,
Defendant-Appellant.

Nos. 78-5273, 78-5274.

United States Court of Appeals,
Fifth Circuit.

July 11, 1979.

Defendant was convicted before the United States District Court for the Southern District of Florida, Wm. M. Hoeveler, J., of making a false statement in a loan application to a federally insured bank and obstructing justice, and he appealed. The Court of Appeals held that: (1) prosecution was not required to be dismissed on ground that the Government improperly obtained information from defense counsel where, acting on defendant's behalf in seeking to barter information for leniency on other charges, defense counsel initiated contact with Government's key investigator and communicated information regarding defendant's role in arranging financing of what he thought was to be a legitimate gun operation, information as to codefendant's trip to secure financing and details concerning defendant's later discovery of gun smuggling since not only did counsel state that defendant maintained his innocence but the same information was available from other sources and defendant himself subsequently communicated substantially the same

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constitute no part of the opinion of the court.

information to the Government, and (2) even if search warrant was improperly based on evidence obtained from defense counsel, proper remedy would have been suppression.

Affirmed.

1. Criminal Law ⇐1165(1)

It is fatal to a conviction for the Government to obtain defense strategy from an attorney only where there is a realistic possibility of injury to defendant or benefit to the state.

2. Indictment and Information ⇐144.1(1)

Indictment was not required to be dismissed on ground that Government improperly obtained information from defense counsel where although counsel discussed defense strategy with a friend who was a supervisory customs air officer, such officer did not communicate the information to his superiors and was not officially assigned to the case and since the Government did not purposely infiltrate the defense camp, there was no realistic possibility of harm to defendant or benefit to the Government.

3. Indictment and Information ⇐144.1(1)

Dismissal of indictment was not required, on ground that Government improperly obtained information from defense counsel, where, acting on defendant's behalf in seeking to barter information for leniency on other charges, counsel initiated contact with Government's key investigator and gave him information regarding defendant's role in arranging financing of what defendant thought was to be a legitimate gun operation as

[1]Defendant was not convicted on the gun smuggling counts in the indictment. 22 U.S.C.A. §1934(a) and 26 U.S.C.A. §5861(e) and §5871. He was convicted on the counts charging him with making a false statement in a loan application to a federally insured bank, conspiracy to obstruct justice, and aiding and abetting in the obstruction of justice under the following statutes:

well as trips by codefendant to secure financing and details concerning defendant's later discovery of gun smuggling and such information was available from other sources and defendant himself communicated substantially the same information to the Government and counsel told investigator that defendant maintained his innocence.

4. Indictment and Information ⇐144.1(1)

Where only evidence introduced at trial that implicated defendant and related to defense counsel's communications with the Government was codefendant's diary seized during a search and even assuming that the evidence was obtained by the Government in an illegal manner, proper remedy would be suppression, not dismissal of the prosecution.

5. Criminal Law ⇐667(1)
Witnesses ⇐198(1)

Refusal to permit two attorneys to give exculpatory testimony was proper where as to some of the testimony no proper predicate was laid and remainder was covered by attorney-client privilege. Fed. Rules Evid. rule 613(b), 28 U.S.C.A.

18 U.S.C.A. §1014, which provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C.A. §2, which provides for punishment of anyone who assists in the illegal enterprise as a principal.

18 U.S.C.A. §1503, which provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, . . . before . . . any grand or petit juror, . . . or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C.A. §371, which provides for punishment for a conspiracy to commit an offense against the United States.

6. Criminal Law⇐627.10(2)

It was not error to refuse to require the Government to reveal identity of a fourth informant mentioned in search warrant where defendant did not meet his burden of showing why informant's name should be revealed, in that no specific need for disclosure was shown and no evidence supplied by informant was used at trial.

7. Witnesses⇐269(2)

Refusal to permit cross-examination concerning unsavory background of key government investigator's informants, which examination was intended to discredit agent's testimony, was proper since informants' background had nothing to do with agent's testimony on direct, in that although agent testified about search based on warrant obtained in reliance on information supplied by the informants, he did not refer to the warrant or his informants. Fed. Rules Evid. rule 611(b), 28 U.S.C.A.

8. Witnesses⇐269(1)

Generally, cross-examination is limited by the scope of direct examination. Fed. Rules Evid. rule 611(b), 28 U.S.C.A.

Appeals from the United States District Court for the Southern District of Florida.

Before THORNBERRY, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Appealing his false loan application and obstruction of justice convictions, defendant *first* contends that the indictment should have been dismissed because it was based on information

obtained by the Government from his attorney, and, *second* argues that he was denied a fair trial because the court improperly restricted the testimony of two defense witnesses and the cross-examination of a Government witness, and the Government failed to disclose a confidential informant. Concluding that the facts of this case do not support the relief requested, we affirm.

Defendant was charged with assisting in the submission of a materially false statement to a federally insured bank to obtain financing for a gun smuggling operation and with obstructing justice by preventing an investigation into these financial arrangements.[1]

DISMISSAL OF INDICTMENT

Prior to trial, defendant moved to dismiss the indictment on the ground that the Government had improperly obtained information from his attorney, Robert Senor. Senor had contacted Government agents for the purpose of arranging leniency for the defendant on a marijuana charge. Without detailing the evidence in relation to these contacts and the information revealed to the Government by Senor, it appears from the record that defendant cannot prevail under any theory presented.

[1] In *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the Supreme Court held it fatal to a conviction for the Government to obtain defense strategy from an attorney only where there was "a realistic possibility of injury to [defendant] or benefit to the State." *Id.* 429 U.S. at 558, 97 S.Ct. at 845.

[2] Senor testified he had discussed defense strategy with his friend Edward Ragen, a Supervisory Customs Air Officer. Since Ragen did not communicate this information to his superiors and was not officially assigned to this case, and the Government did not purposely infiltrate the defense camp, there

was no realistic possibility of harm to defendant or benefit to the Government. Senor's statement to Zisk that Franklin maintained his innocence cannot be regarded as a disclosure of the defense strategy.

Defendant further contends that the Government had made Senor its undercover agent. Although the affidavit for warrants to search codefendants' premises and automobiles had listed Senor as a "confidential source" and contained information relayed by Senor, the facts do not support the contention here made.

Acting on defendant's behalf in seeking to barter information for leniency on the marijuana charge, defendant's attorney initiated the contact. It appeared to the Government that he was acting with the approval of his client in his client's best interests. Throughout these communications Senor insisted that his client was innocent of any wrongdoing in the gun smuggling operation and only wished to exchange information incriminating others for leniency. This case is thus fundamentally different from *Messelt v. Alabama,* 595 F.2d 247 (5th Cir. 1979), in which an "utter perversion of the attorney-client relationship" resulted from the defense attorney's effort to gain leverage for the payment of his fee by suggesting to the prosecution that his client be charged with more serious offenses, and his proposal to his client that they participate together in a drug scheme. *Id.* at 251.

The Government's response to Senor's efforts was restrained and proper. The Government agent, Philip Zisk, told Senor he was not interested in bargaining and already had access to information about the smuggling operation. Although Zisk did list Senor as a source of information in the application for the search warrants, he testified that the information on which the affidavit was based came primarily from undercover officers, that Senor was only one of four sources, and that the information provided by him was merely cumulative. Defendant had no interest in the property searched, was without standing to challenge the validity of the search, and did not attempt to do so. *See Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973). Senor thus was not, as claimed, a confidential agent in the service of the Government.

[3] Basically, Senor communicated three items of information to Zisk: (1) defendant's role in arranging the financing of what he thought was to be a legitimate gun operation; (2) trips to Cleveland by a codefendant to secure financing; and (3) details concerning Franklin's later discovery of gun smuggling. That Senor communicated information given by his client to the Government does not taint his conviction for several reasons. First, the information was available to the Government from other sources and not based on Senor's communications. Second, the information did not incriminate defendant. Third, the information was communicated voluntarily as an inducement to a plea bargain. Fourth, at a later meeting defendant himself communicated substantially the same information to the Government through Senor, thereby waiving any privilege he may have had and ratifying Senor's communication, if he had not in fact approved it from the outset. *See United States v. Pipkins,* 528 F.2d 559, 562-563 (5th Cir. 1976); *United States v. Cote,* 456 F.2d 142 (8th Cir. 1972). *See also* 8 Wigmore, *Evidence* §2327 (McNaughton rev. 1961). Fifth, neither the information communicated by Senor nor the fact the communication took place was introduced at trial.

[4] The only evidence introduced at the trial that implicated defendant and which related to Senor's communication was a codefendant's diary seized during the search. Even assuming that evidence was obtained by the Government in an illegal manner, the proper remedy would be suppression, not dismissal of the prosecution. *See United States v. Blue,* 384 U.S. 251, 255,

86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). Suppression was not sought. In any event, the evidence had minimal impact.

Therefore, the district court did not err in denying the motion to dismiss the indictment.

DENIAL OF A FAIR TRIAL

Defendant alleges he was denied a fair and impartial trial because of three erroneous rulings: (1) refusal to permit exculpatory and impeaching testimony; (2) nondisclosure of the identity of a Government informant; and (3) restriction of the cross-examination of the Government's key investigator.

[5] At the close of the Government's case, defendant sought to produce exculpatory evidence in his defense through the testimony of two attorneys. The trial court properly refused to permit them to testify. As to some of the testimony, no proper predicate was laid. Fed. R. Evid. 613(b).[2] *See United States v. Lipscomb,* 435 F.2d 795, 802 (5th Cir. 1970), *cert. denied,* 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971). The remainder was covered by the attorney-client privilege. *See Chirac v. Reinicker,* 24 U.S. (11 Wheat.) 280, 6 L.Ed. 474 (1826); *United States v. Kelly,* 569 F.2d 928, 938 (5th Cir. 1978), *cert. denied,* — U.S. —, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978).

[6] A magistrate had ordered the Government to have the fourth informant mentioned in the search warrant available at trial should the defendant desire to call him. The order did not permit the informant to be called without a showing to the district court of the necessity for disclosure of his identity. The court did not err in refusing to require the Government to reveal the identity of this informant since defendant did not meet his burden of showing why it should be revealed. *United States v. Hansen,* 569 F.2d 406, 411 (5th Cir. 1978); *United States v. Hernandez-Vela,* 533 F.2d 211, 213 (5th Cir. 1976). *See Roviaro*

v. United States, 353 U.S. 53, 62, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (balancing test applied). No specific need for disclosure was shown and no evidence supplied by this informant was used at trial.

[7, 8] On cross-examination, the court refused to permit questions concerning the unsavory background of Agent Zisk's informants which were intended to discredit his testimony. Their background, however, had nothing to do with Zisk's testimony on direct. Although he did testify about the search, he did not refer to the warrant or his informants. Generally, cross-examination is limited by the scope of the direct examination and, here, there was no abuse of discretion in limiting the cross-examination. Fed. R. Evid. 611(b).[3] *See United States v. Markham,* 537 F.2d 187, 196 (5th Cir. 1976), *cert. denied,* 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977).

AFFIRMED.

[2]Fed. R. Evid. 613(b) provides:

> **(b) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[3]Fed. R. Evid. 611(b) provides:

> **(b) Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Adm. Office, U.S. Courts — West Publishing Company, Saint Paul, Minn.

CONSTITUTION
of the
UNITED STATES OF AMERICA

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

(a) Pleadings and motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

FEDERAL RULES OF EVIDENCE, RULE 613

Rule 613. Prior Statements of Witnesses

(a) Examining Witnesses Concerning Prior Statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, *Plaintiff,*	)	**CASE NO. FL 76-6066-Cr-CJS** **JUDGE C. CLYDE ATKINS**
v.	)	
GERALD "Jerry" WAYNE CUNNINGHAM, ET AL.,	)	**MOTION TO DISCLOSE IDENTITY OF INFORMANTS**
Defendants.	)	

Now comes Defendant, Morton H. Franklin, by and through his attorney, Leonard W. Yelsky, and respectfully moves this Honorable Court to order the United States Government to disclose the identity of the informants whose information the Government relies on in the prosecution of this case. Defendant further moves this court to reveal the contents of any communications from all confidential informants.

A memorandum of law setting forth the reasons and citations of authority in support of this motion is attached hereto.

Respectfully submitted,

LEONARD W. YELSKY
Attorney for Morton H. Franklin

OF COUNSEL:

YELSKY, EISEN & SINGER CO., L.P.A.
740 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISCLOSE IDENTITY OF INFORMANTS

The basis for this Motion is that the Government's case is laid upon a foundation of information obtained from confidential informants; that said informants' identity is material to the defense of the accused; and, that the content of the communications are essential to a fair determination of this cause.

The Affidavit of Special Agents Zisk and Hopgood makes reference to information supplied by four confidential informants. This information is highly material to the merits of the charge pending against defendant.

At pages 2 and 3 (attached Exhibit A):

> "From the months of August, 1975 through and including December 1975, Special Agent Zisk received information from four (4) independent, confidential sources that the one thousand (1000) machine guns which Cunningham intended to buy from Mitchell Werbell III were subsequently going to be illegally exported by Cunningham from the United States to a country or countries outside the continental limits of the United States. They (the sources) also independently stated that Cunningham would report a burglary from D.W.I.E.R., Inc., of the machine guns to cover the illegal exportation."

And again at page 4 (attached Exhibit A):

> "Following receipt of the firearms by D.W.I.E.R., Inc., at 601 N.E. 28th Street, Pompano Beach, Florida, Special Agent Zisk was again advised by confidential sources that Cunningham still intended to illegally export these machine guns from the United States to a country or countries outside the continental limits of the United States and report a fictitious burglary. These sources also stated that Cunningham intended to purchase over five hundred (500) additional machine guns from Werbell's company, Defense Service Company, Powder Springs, Georgia, and export them illegally."

While the government is privileged to withhold the identity of persons who furnish information with respect to violations of the law by others, this privilege is not absolute. *Scher v. United States,* 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938). The privilege must give way where the identity of the informer, or the contents of his statement are essential to a fair trial.

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the government withholds the information, dismiss the action . . . " *Roviaro v. United States,* 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In the case at bar, information supplied by confidential informants is highly material to the merits of the charges pending against defendant. In fact, defendant is charged with offenses responsive to the information provided by said informants. Count I of the indictment alleges in pertinent part:

> "The defendants, did knowingly, willfully and unlawfully combine, conspire, confederate, and agree together . . . to violate Section 1934 of Title 22, United States Code, that is, to engage in the business of exporting arms, ammunitions and implements of war. . . . It was further part of said conspiracy that in order to conceal the unlawful exportation of the machinegun units in violation of Section 1934, Title 22, the defendants would report that said units were stolen in a burglary."

In *Roviaro,* the Supreme Court held there exists no set rule with respect to disclosure of informants.

> "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. *Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.*" [Emphasis Added] 353 U.S. at 62.

In the present case, the materiality of informants' possible testimony must be determined by reference to the offense charged in Count I and the evidence relating to that count. The count alleges that defendant did knowingly and willfully conspire to violate 22 U.S.C. §1934 and that in order to conceal this violation defendants would report said units were stolen in a burglary. However, the overt acts alleged to have been performed by defendant Franklin indicate a very limited and questionable involvement in the alleged scheme. In fact, of the twenty-seven (27) overt acts alleged in Count I, defendant Franklin is alleged to have merely met with co-defendants Gerald Cunningham, Earl Warren Dameworth and Henry Grecco (pt. 2) in or about August of 1975 up to and including on or about September 9, 1975; to have given a financial statement of Gerald Cunningham and Defense Weapons International Engineering and Research, Incorporated, to James Neveras, Vice President, Commercial Credit Department, the Trust Company of New Jersey, Jersey City, New Jersey in or about September, 1975 (pt. 6), and to have had a telephone conversation with James Neveras on or about April 7, 1976 (pt. 26).

In view of the limited involvement alleged by the Govern-

ment, the identity of the informants and the content of their communication is highly material to the issue of defendant's guilt or innocence as to defendant's knowledge, purpose or intent to conspire to violate 22 U.S.C. §1934, and essential to defendant's right to a fair trial. The fact that defendant Franklin will be faced with the burden of explaining or justifying his alleged actions in relation to the offense charged in Count I of the indictment emphasizes his vital need for access to any material witness. The circumstances surrounding this indictment demonstrate that the informants' possible testimony is highly relevant to defendant Franklin's guilt or innocence to Count I of the indictment and would be most helpful to his defense.

In *McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62, *reh den.* 386 U.S. 1042, 87 S.Ct. 1474, 18 L.Ed.2d 616 (1967), the Supreme Court reviewed the circumstances requiring disclosure of informants, relying on its prior determination in *Roviaro:*

> "The Court's opinion then carefully reviewed the particular circumstances of Roviaro's trial, pointing out that the informer's 'possible testimony was highly relevant . . . ,' that he 'might have disclosed an entrapment . . . ,' 'might have thrown doubt upon petitioner's identity or on the identity of the package . . . ,' 'might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" . . . ,' and that the 'informer was the sole participant, other than the accused, in the transaction charged.' 353 U.S., at 63-64. The Court concluded 'that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.' 353 U.S., at 65." *McCray v. Illinois,* 386 U.S., at 310-311.

The case at bar requires disclosure for the same reasons, and should so be ordered in furtherance of defendant Franklin's essential right to a fair trial.

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . " U.S. Const. Sixth Amend.

For all the aforementioned reasons and authorities of law, defendant respectfully moves this Honorable Court to order the United States Government to disclose the identity of the informants and the content of any confidential communication which the Government relies on in the prosecution of this case.

Respectfully submitted,

LEONARD W. YELSKY
Attorney for Morton H. Franklin

OF COUNSEL:

YELSKY, EISEN & SINGER
CO., L.P.A.
340 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. FL 76-6066-Cr-CA(s)

UNITED STATES OF AMERICA :
V.

ORDER

MORTON H. FRANKLIN :

This cause was previously before the Court upon the defendant Morton H. Franklin's Motion to Disclose Identity of Informants. By Order dated June 1, 1977, ruling on said motion was deferred, and the government was directed to provide the Court with a written memorandum under seal advising the Court of the full facts with respect to informant's information, together with appropriate citations of law in support of its position of opposition to this motion. The government has now responded, withdrawing its opposition with respect to disclosure of informants assigned numbers 1 through 3, but continuing to assert its opposition with respect to informant #4 on the grounds that such disclosure would jeopardize the life of said informant and destroy his potential and future usefulness in continuing investigations. Upon consideration of the defendant's motion, and the government's response, it is

ORDERED AND ADJUDGED as follows:

1. The government is directed to forthwith disclose the identity of informants numbered 1 through 3 and to reveal the contents of any communications from said confidential informants.

2. The government shall not be required to disclose the

identity of confidential informant #4. The government is directed, however, to take such steps as may be necessary to assure the presence of confidential informant #4 at trial so that he may be available as a defense witness should the defendant or defendants desire to call him.

It is further ORDERED that the government's sealed memorandum, together with all accompanying papers, shall be sealed and made a part of the record of this case, to be opened only upon order of this Court, or as may be appropriate for purposes of appealing this order.

DONE AND ORDERED at Miami, Florida, this 7th day of June, 1977.

J. V. ESKENAZI
UNITED STATES
MAGISTRATE

cc: U.S. Dept. of Justice
(John F. Evans, Esq.)

Leonard Yelsky, Esq.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

JFE:hkr

Miami, Florida

June 13, 1977

RE: *UNITED STATES* v.
BARTONE, et al
NO. 76-6066-Cr-CA(s)

Gentlemen:

Pursuant to order of Judge J. V. Eskenazi of June 7, 1977, I am disclosing to you forthwith the following information with respect to three confidential informants named in Zisk and Hopgood's search warrant affidavit of February 19, 1976. The confidential sources are:

1. Detective Wayne Tobey, Pompano Beach Police Department, already disclosed to the defense on or about September 23, 1976, in response to the defendant Cunningham's Bill of Particulars, Item 9. The information is disclosed in the search warrant affidavit.
2. Kenneth Bernstein, now deceased. The information is set out in the search warrant affidavit.
3. Robert Senor, an attorney from Cleveland, Ohio, who telephoned Special Agent Zisk with the information supplied in the search warrant affidavit in December 1975. Mr. Senor is the same Robert Senor referred to in letters, and materials therewith, dated May 26 and 27, 1977, mailed to the defense. Mr. Senor has acted as an attor-

ney for the defendant Morton H. Franklin over a substantial period of time.

I am also enclosing forthwith pursuant to Rule 16 F.R.Cr.P. a certificate from the United States Department of State with respect to the defendant Grecco.

Sincerely,

JOHN F. EVANS
Special Attorney
U.S. Department of Justice

ADDRESS:
111 N.W. 5th Street
Miami, Florida 33128
Tel: 305-350-4259

Encls.

cc: Honorable C. Clyde Atkins
Honorable J. V. Eskenazi

cc: Leonard Yelsky, Esq.
Ben Cohen, Esq.
Robert Moore, Esq.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	**CASE NO. FL 76-6066-CR-CJS**
Plaintiff,	)	**JUDGE WILLIAM M. HOEUELER**
v.	)	
GERALD "JERRY" WAYNE CUNNINGHAM, ET AL.,	)	**MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**
Defendants.	)	**(REQUEST ORAL HEARING)**

Now comes the Defendant, Morton H. Franklin, by and through his attorney, Leonard W. Yelsky, and respectfully moves this Honorable Court for an Order to dismiss the herein matter, pursuant to its power and authority under Rule 12 of the Federal Rules of Criminal Procedure, on the following grounds:

1) That the charges contained in the herein indictment are constitutionally invalid because the Government knowingly and deliberately arranged and permitted a gross intrusion into the attorney-client relationship by using Defendant Franklin's legal counsel in the capacity of a confidential informant and by using information obtained from said confidential informant [attorney] to perfect an indictment against Defendant Franklin in direct violation of Defendant's Fourth Amendment right to privacy, Fifth Amendment right to due process and Sixth Amendment right to the effective assistance of counsel.

A memorandum of law setting forth the reasons and citations of authority in support of this Motion is attached hereto.

Respectfully submitted,

LEONARD W. YELSKY
Attorney for Defendant,
Morton Franklin

OF COUNSEL:

YELSKY, EISEN & SINGER
CO., L.P.A.
340 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

FACTS:

Recently, Defendant Franklin requested this Honorable Court to order the United States Government to disclose the identity of the four informants mentioned in a search warrant affidavit, whose information the Government relied upon in obtaining the indictment in this case. The basis for the Motion to disclose the identity of informants was that the Government's case was predicated on the reliability, credibility and constitutionality of information obtained from the aforementioned confidential informants; that the Government's affidavit for search warrant, the search warrant itself and the charges alleged in the indictment were all responsive to the information provided by said confidential informants; and, that the identity of the confidential informants and the content of their communications to the government were essential to a fair determination of this cause.

The Government resisted disclosure. In response to Defendant Franklin's Motion, the government argued in its brief that it could not provide the Court with the full facts concerning the informants because disclosure could "possibly" jeopardize the physical wellbeing of one or more of the informants. The Government subsequently altered its position, and on June 7, 1977, Judge J. V. Eskenazi ordered the disclosure of three confidential sources.

In response to Judge Eskenazi's order, the Government revealed that a confidential informant instrumental in the prosecution of this case is one Robert Senor. Mr. Senor is an attorney in Cleveland, Ohio. He has acted as legal counsel for Defendant Franklin over a substantial period of time. The Government revealed it was Mr. Senor who telephoned Special Cus-

toms Agent Zisk with the information supplied in the search warrant affidavit in December of 1975 (attached Exhibit "A"). In addition, this information laid the foundation for the Government's indictment against Defendant Franklin.

ARGUMENT:

This motion is made pursuant to Rule 12 of the Federal Rules of Criminal Procedure which provides in pertinent part:

> " . . . All other pleas . . . shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.
>
> (b) Defenses and objections which may be raised.
>
> **(b)** Any defense or objection which is capable of determination without the trial of the general issue. . . .
>
> (1) Defenses and objections based on defects in the institution of the prosecution;
>
> (2) Defenses and objections based on defects in the indictment. . . . "

In the present case, blatant constitutional improprieties were perpetuated by the Government in the institution of the prosecution and in the indictment against the defendant. More particularly, the Government knowingly and deliberately arranged and permitted a gross intrusion into the attorney-client relationship by using Defendant Franklin's legal counsel in the capacity of a confidential informant and by using privileged information obtained from Defendant's attorney to obtain an indictment against the Defendant. As such, both the institution of the prosecution and the indictment against the Defendant are constitutionally void and invalid as repugnant to the spirit and meaning of the Fourth, Fifth and Sixth Amendments to the United States Constitution.

It is well settled law, that a conviction involving a gross intrusion by the government upon the confidential relationship between Defendant and his counsel is constitutionally defective and cannot stand. *O'Brien v. United States,* 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967); *Black v. United States,* 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966); *Hoffa v. United States,* 385 U.S. 293, 306, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). The rationale underlying this rule is founded upon the Bill of Rights. The Fifth Amendment enjoins that no person be deprived of life, liberty or property without due process of law. Such due process includes the right to have the effective and substantial aid of counsel. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Fourth Amendment commands officers of the government to comply with the basic procedural requirements before the innermost secrets of one's home or office are invaded. *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Moreover, the Sixth Amendment assures Defendant of his right to enjoy the effective assistance of counsel.

> "It is well established that an accused does not enjoy the effective aid of counsel if he is denied the *right of private consultation* with him." [Emphasis added] *Coplon v. United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

The case at bar involves government intrusion of the grossest kind upon the confidential relationship between the Defendant and his attorney. In effect, the government used Defendant Franklin's attorney, Robert Senor, to "spy" on the Defendant during its investigation of this case. Pursuant to Judge Eskenazi's order to disclose the identity and information of confidential informants, the government admitted it used information supplied by Mr. Senor in its search warrant affidavit (attached Exhibit "A"). The affidavit read in part:

"From the months of August, 1975 through and including December, 1975, Special Agent Zisk received information from four (4) independent, confidential sources that the one thousand (1,000) machine guns which Cunningham intended to buy from Mitchell Werbell III were subsequently going to be illegally exported by Cunningham from the United States. . . . They (the sources) also independently stated that Cunningham would report a burglary from D.W.I.E.R., Inc., of the machine guns to cover the illegal exportation."

The Defendant was subsequently charged with offenses responsive to the information provided by the government's confidential informant and attorney for Defendant Franklin, Mr. Robert Senor. Count I of the indictment alleges in pertinent part:

"The Defendants did knowingly, willfully and unlawfully combine, conspire, confederate, and agree together . . . to violate §1934 of Title 22, United States Code, that is, to engage in the business of exporting arms, ammunitions and implements of war. . . . It was further part of said conspiracy that in order to conceal the unlawful exportation of the machinegun units in violation of §1934, Title 22, the Defendants would report that said units were stolen in a burglary."

The government's indictment was therefore a direct result of the Government's "spying" or intrusion into Defendant Franklin's attorney-client relationship with Mr. Senor.

The Government's flagrant disregard for Defendant's basic constitutional rights warrants dismissal of this cause. In *Hoffa v. United States,* the high court noted the case of *Caldwell v. United States,* 92 App. D.C. 355, 205 F.2d 879 (D.C. Cir. 1953), as indicative of a conviction tainted by evidence violative of the attorney-client relationship. The case is similar to the one at

bar. There an intrusion of the attorney-client relationship occurred when the prosecution hired an under-cover agent to investigate a case pending for trial. The undercover agent became intimately acquainted with the Defendant and his then legal counsel. In reversing the conviction the court held:

" . . . High motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel. *The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the government can with impunity place a secret agent in a lawyer's office, to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. . . . If it does occur a conviction tainted by it cannot stand.*" [Emphasis added] *Caldwell v. United States,* 205 F.2d 879, 881 (D.C. Cir. 1953).

The present case is even more extreme. Rather than utilizing one close to Defendant's attorney-client relationship in constructing its case against the Defendant, the government used Defendant's own attorney to obtain the information alleged in its indictment. Such behavior shocks the public conscience and cannot result in a constitutionally valid conviction.

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty." *Coplon v. United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

CONCLUSION:

For all of the aforementioned reasons and policies of law inherent in the Fourth, Fifth and Sixth Amendments to the United States Constitution, Defendant respectfully moves this Honorable Court for an Order dismissing the herein matter.

Respectfully submitted,

LEONARD W. YELSKY
Attorney for Defendant,
Morton H. Franklin

OF COUNSEL:

YELSKY, EISEN & SINGER
CO., L.P.A.
340 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to John F. Evans, U.S. Department of Justice, 111 N.W. 5th Street, Miami, Floria 33128; Ben Cohen, Esq., Penthouse, 420 Lincoln Road, Miami Beach, Florida 33139; and Robert L. Moore, Esq., Suite 200 White Building, 209 East Flagler Street, Miami, Florida 33131, the _____ day of July, 1977.

LEONARD W. YELSKY
Attorney for Defendant,
Morton H. Franklin

THE NEW YORK TIMES, WEDNESDAY, AUGUST 1, 1979

Proposed Charter Governing F.B.I. Unveiled by Carter Administration

By PHILIP TAUBMAN
Special to The New York Times

WASHINGTON, July 31 — The Carter Administration today formally unveiled its proposed governing charter for the Federal Bureau of Investigation. The charter, which would be the first for the bureau, restricts but does not prohibit such controversial investigative techniques as the use of informers, undercover agents and covert criminal activity.

President Carter, in a message sent to Congress with the legislation, said, "The public must be assured that the F.B.I. is acting properly under the law. This charter strikes the proper balance between assuring that the civil liberties guaranteed to Americans by our Constitution are protected and that the F.B.I. can fully pursue its appropriate functions."

The charter specifies the powers and duties of the bureau, establishing precise standards and procedures for the conduct of investigations. It creates safeguards against harassment of citizens, break-ins and other past abuses.

The safeguards take the form of governing principles for the bureau, guidelines for conduct to be laid down by the Attorney General, and specific restrictions on some investigative work. The charter also contains an extensive list of internal procedures to be followed by agents and informers.

Allows Continued Surveillance

At the same time, it allows the continued use of electronic surveillance with court approval, it authorizes illegal actions in

certain circumstances, and it increases the bureau's access to such confidential information as bank records without a grand jury subpoena.

The charter sent to Congress today contains no major changes from an earlier draft that was obtained in May by several news organizations, including The New York Times.

The charter is an outgrowth of disclosures about abuses by the bureau under J. Edgar Hoover. These included burglaries, mail thefts and the use of informers and illegal surveillance against such groups as the Black Panther Party, the Weather Underground and the Socialist Workers Party.

The bureau has been operating for three years under guidelines established by former Attorney General Edward H. Levi to prevent the continuation of such abuses. The charter is an effort to go one step further and put the bureau under permanent, statutory control.

Statement by Kennedy

Mr. Levi endorsed the charter today at a ceremony at F.B.I. headquarters, as did the chairmen and ranking Republican members of the Senate and House Judiciary Committees, Attorney General Griffin B. Bell and his designated successor, Benjamin R. Civiletti, F.B.I. Director William H. Webster and Stuart E. Eizenstat, assistant to the President for domestic affairs.

Senator Edward M. Kennedy, chairman of the Senate Judiciary Committee, who played a major role in preparing the draft, said, "The charter symbolizes the fact that the bureau has learned from its mistakes and comes forward with a charter which will insure that the chronicled abuses of the past will not be repeated."

Senator Strom Thurmond of South Carolina, the senior

minority member of the committee, said he planned to support the charter, indicating that it will not face major conservative opposition.

But the charter faces serious obstacles to enactment in its present form, primarily from liberal critics. Dozens of civil liberties groups oppose specific provisions, including those that permit the continued use of electronic surveillance, give the bureau access to private financial records, and approve the use of lawyers and journalists as paid informers.

Civil liberties groups are also concerned that the charter would exempt the bureau from provisions of the Freedom of Information Act and would allow the destruction of bureau records that critics say detail past abuses. They also contend that the charter fails to provide for sufficient Congressional oversight.

Jerry J. Berman, legislative counsel at the American Civil Liberties Union, said, "We support the concept of an F.B.I. charter and believe that this draft does recognize principles essential to controlling the bureau, but we think that a great deal of change is necessary to insure that the principles are fully embodied."

Plans to Review Charter

Senator Kennedy, aware of these concerns, said the Judiciary Committee would carefully review, and probably revise, sections of the charter. Hearings are scheduled to begin on Thursday, though serious consideration of the charter is not expected to begin until September.

According to Congressional sources, the F.B.I. charter stands a better chance of passage than a proposed charter to govern agencies involved in foreign intelligence operations, including the Central Intelligence Agency and the National Security Agency.

The foreign intelligence charter bogged down in the Senate last year. Its supporters have been negotiating with the Carter Administration to resolve their differences and expect the introduction of a new charter in the Senate in September.